Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04–44 OF 1994
ANUAR CJ (MALAYA), MOHD AZMI FCJ AND GOPAL SRI RAM JCA
6 JANUARY 1997

Labour Law *— Industrial Court — Jurisdiction — Non-Malaysia citizen employed abroad by Malaysian company — Whether Industrial Court has extra-territorial jurisdiction — Industrial Relations Act 1967 s 20(1)*

Labour Law *— Industrial Court — Jurisdiction — Exercise of extra-territorial jurisdiction — Claimant was employed by an employer within the jurisdiction but was required to perform his contract of employment in another company in a foreign country— Applicant paid taxes levied by that country and made payments towards compulsory saving scheme that was in operation in that country — Whether the dispute was extra-territorial — Whether the Industrial Court has jurisdiction to adjudicate the matter — Industrial Relations Act 1967 s 20(1)*

Labour Law *— Industrial Court — Jurisdiction — Reference under s 20(3) of the Industrial Relations Act 1967 — Whether jurisdiction of Industrial Court could be challenged without challeging the Minister's reference — Whether the threshold jurisdiction of the Industrial Court could be challenged by way of a preliminary objection*

The appellant, a Sri Lankan, was employed by the respondent, a Malaysian company in Sabah. When the appellant failed to obtain renewal of his work permit, the respondent seconded the appellant to Singapore where the latter continued to give corporate advice to the respondent's related companies for the remaining period of his existing contract. While in Singapore, the appellant paid taxes in the Republic and contributed to the Central Provident Fund of that country. Subsequently, the respondent requested the appellant to resign for having allegedly performed unsatisfactory work. The appellant considered himself to have been wrongfully dismissed and complained to the Director General of Industrial Relations who, having unsuccessfullly attempted a reconciliation between the parties, referred the dispute to the Minister who then referred it to the Industrial Court under s 20 of the Industrial Relations Act 1967 ('the Act'). The respondent did not challenge the Minister's reference of the dispute to the Industrial Court.

After hearing the respondent's preliminary objection on the question of its jurisdiction, the Industrial Court ruled that it had jurisdiction to adjudicate on the dispute. The High Court, however, accepted the respondent's contention that the dispute was extra-territorial in nature and hence it could not adjudicate upon it. Accordingly, the respondent's application for an order of prohibition against the Industrial Court was allowed. The appellant appealed.

Two issues were raised, ie: (i) whether, having regard to the facts of the case, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister; and (ii) whether it was open

to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that court. A

Held, allowing the appeal:

(1) The Industrial Court is a creature of the Act which does not confer extra-territorial jurisdiction upon it. Accordingly, the court has no extra-territorial jurisdiction. B

However, the facts of this case did not give rise to the exercise of any extra-territorial jurisdiction by the Industrial Court. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concluded the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment in another company in a foreign country and was required to pay taxes levied by that country or to make payments towards any compulsory saving scheme that was in operation in that country could not make the dispute extra-territorial in nature. Further, the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court (see pp 691E–F and 692D–F); *Cik Aniza bte Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors* [1988] 1 MLJ 451 followed. C D E

(2) The threshold jurisdiction of the Industrial Court may only be challenged by seeking to quash the Minister's reference and in the same application ask for an order of prohibition against that court. The threshold jurisdiction of the Industrial Court could not be challenged without joining the Minister and seeking relief against him. F

Also, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court to be made by way of a preliminary objection. This was because the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction to be taken would only delay industrial adjudication (see p 697C–F); *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 followed. G

Per curiam: H

(1) Whilst it is undesirable to formulate any hard and fast rule that is meant to govern all cases that arise for decision, the fact that a workman who was engaged within Malaysia was required by his employer, who was also within the jurisdiction, to carry out his duties in a foreign country would not by itself place his subsequent dismissal in the category of extra-territorial disputes (see p 692G–H). I

(2) In all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an

adjudication, save upon the limited ground that the representations under s 20(1) are made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question.

Therefore, unless the Minister is separately or jointly challenged in making a reference, the High Court should be very slow to grant leave to apply for an order of prohibition against the Industrial Court whilst a reference under s 20 is pending before that tribunal (see pp 699G–I and 700A–B); *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 distinguished and *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 overruled.

[Bahasa Malaysia summary

Perayu, seorang rakyat Sri Lanka, telah digaji oleh penentang, sebuah syarikat Malaysia di Sabah. Apabila perayu gagal mendapatkan pembaharuan lanjut permit pekerjaannya, penentang menghantar perayu ke Singapura di mana perayu terus memberikan nasihat korporat kepada syarikat-syarikat berkaitan dengan penentang untuk baki jangkamasa kontrak yang masih wujud. Semasa di Singapura, perayu membayar cukai di Republik tersebut dan mencarum dalam Kumpulan Wang Simpanan Negara bagi negara Singapura. Berikutnya, penentang telah meminta perayu meletakkan jawatan kerana kononnya telah melaksanakan kerja dengan tidak memuaskan. Perayu menganggap dirinya dipecat secara salah dan mengadu kepada Ketua Pengarah Perhubungan Perusahaan, yang setelah gagal dalam percubaan perdamaian di antara pihak-pihak, merujukkan pertikaian kepada Menteri berkenaan yang kemudiannya merujukkannya kepada Mahkamah Perusahaan di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Penentang tidak mencabar rujukan Menteri tentang pertikaian itu kepada Mahkamah Perusahaan.

Setelah mendengar bantahan awal penentang atas persoalan bidang kuasa, Mahkamah Perusahaan memutuskan ia mempunyai bidang kuasa untuk menghakimi pertikaian tersebut. Namun begitu, Mahkamah Tinggi menerima hujah penentang bahawa pertikaian tersebut adalah bersifat luar wilayah dan oleh itu, ia tidak boleh menghakiminya. Lantaran itu, permohonan penentang untuk suatu perintah larangan terhadap Mahkamah Perusahaan telah dibenarkan. Perayu membuat rayuan.

Dua isu telah dibangkitkan, iaitu: (i) sama ada setelah mengambil kira fakta-fakta kes, Mahkamah Perusahaan mempunyai bidang kuasa untuk menghakimi pertikaian tersebut yang telah dirujukkan kepadanya oleh Menteri tersebut; dan (ii) sama ada ianya terbuka

kepada penentang untuk mencabar bidang kuasa Mahkamah Perusahaan tanpa menyelar tindakan Menteri dalam merujuk pertikaian itu kepada mahkamah tersebut. A

Diputuskan, membenarkan rayuan:

(1) Mahkamah Perusahaan merupakan rekaan Akta tersebut yang tidak mengurniakan bidang kuasa luar wilayah ke atasnya. Ekoran itu, mahkamah tidak mempunyai bidang kuasa luar wilayah. B

Walau bagaimanapun, fakta-fakta kes ini tidak membangkitkan pelaksanaan apa-apa bidang kuasa luar wilayah oleh Mahkamah Perusahaan. Hakikat bahawa perayu telah digaji dalam bidang kuasa oleh seorang majikan yang dalam bidang kuasa menamatkan isu luar wilayah terhadap penentang. Bahawa perayu dikehendaki melaksanakan kontrak penggajian beliau dalam sebuah syarikat lain di negara asing dan dikehendaki membayar cukai yang dikenakan oleh negara itu atau membuat bayaran terhadap apa-apa skim simpanan wajib yang beroperasi dalam negara itu tidak boleh menjadikan pertikaian tersebut bersifat luar wilayah. Selanjutnya, kuasa untuk memecat perayu pada semua masa diletakhak dalam penentang yang berada dalam bidang kuasa wilayah Mahkamah Perusahaan (lihat ms 691E–F dan 692D–F). C D

(2) Bidang kuasa nilai ambang Mahkamah Perusahaan hanya boleh dicabar dengan memohon untuk membatalkan rujukan Menteri dan dalam permohonan yang sama memohon suatu perintah larangan terhadap mahkamah itu. Bidang kuasa nilai ambang Mahkamah Perusahaan tidak boleh dicabar tanpa mencantumkan Menteri tersebut dan mendapatkan relief terhadapnya. E F

Juga, dengan mengambil kira rancangan umum Akta terebut, Parlimen tidak berhasrat supaya sesuatu cabaran bidang kuasa nilai ambang dibuat melalui bantahan permulaan. Ini adalah kerana urusan utama badan perundangan dalam meluluskan Akta tersebut adalah agar pertikaian perusahaan diselesaikan secepat mungkin. Dan jika bantahan permulaan kepada bidang kuasa nilai ambang dibenarkan diambil ianya hanya akan melewatkan penghukuman perusahaan (lihat ms 697C–F); *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 diikut. G

Per curiam: H

(1) Walhal adalah tidak diingini untuk merumuskan apa-apa peraturan yang tegas dan ketat untuk mentadbirkan kesemua kes yang berbangkit untuk keputusan, hakikat bahawa seseorang pekerja yang dilantik di Malaysia adalah dikehendaki oleh majikannya, yang juga dalam bidang kuasa, untuk melaksanakan kewajipan-kewajipannya di sebuah negara asing tidak akan dengan sendirinya meletakkan pemecatan kemudian beliau dalam kategori pertikaian luar wilayah (lihat ms 692G–H). I

(2) Dalam semua kes di mana sesuatu pihak kepada pertikaian perniagaan berniat mempersoalkan bidang kuasa nilai ambang Mahkamah Perusahaan untuk membuat penghukuman, kecuali atas alasan terhad bahawa representasi tersebut di bawah s 20(1) adalah dibuat di luar masa, dia mestilah berbuat demikian dengan memohon untuk membatalkan, melalui certiorari, rujukan Menteri tersebut dan dalam prosiding yang sama, meminta suatu perintah larangan terhadap Mahkamah Perusahaan daripada melayan pertikaian tersebut atas alasan bahawa ia tiada bidang kuasa untuk membuat suatu penghukuman. Di mana suatu cabaran tidak diambil sedemikian, Mahkamah Perusahaan mestilah dibenarkan untuk memutuskan pertikaian tersebut hingga penghabisan dan dalam proses tersebut menguruskan persoalan bidang kuasa.

Maka, melainkan Menteri tersebut adalah dicabar secara berasingan atau bersama dalam membuat sesuatu rujukan, Mahkamah Tinggi haruslah berjaga-jaga dalam memberikan kebenaran untuk memohon suatu perintah larangan terhadap Mahkamah Perusahaan sementara menunggu penyelesaian suatu rujukan di bawah s 20 di hadapan tribunal tersebut (lihat ms 699G–I dan 700A–B); *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 dibeza dan *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297 ditolak.]

Notes

For cases on the jurisdiction of the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 943–974.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (refd)
Assunta Hospital v Dr A Dutt [1980] 1 MLJ 96; [1981] 1 MLJ 115 (folld)
Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors [1988] 1 MLJ 451 (folld)
Council of Civil Service Unions & Ors v The Minister for the Civil Service [1985] AC 374 (refd)
Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238 (distd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297 (overd)
Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd [1980] 2 MLJ 248 (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd) A

Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Legislation referred to B

Industrial Relations Act 1967 s 20(1)

Appeal from: Originating Motion No R2–25–96 of 1993 (High Court, Kuala Lumpur)

B Lobo (*Lobo & Associates*) for the appellant. C

N Sivabalah (*Shearn Delamore & Co*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): Having allowed this appeal and made the necessary consequential orders, we now give reasons for our decision. D

Facts and background

The appellant (the claimant before the Industrial Court) is a citizen of Sri Lanka. He was employed by the respondent, a Malaysian company in Sabah. His employment was conditional upon his work permit being periodically renewed. He worked satisfactorily in Sabah for four years. His work permit expired on 30 April 1988 and further renewal could not be obtained. But the respondent did not terminate his services. Instead, the respondent, with effect from 1 May 1988, seconded him to Singapore where he continued to give corporate advice to the respondent's related companies for the remaining period of his existing contract. E F

On 11 November 1989, the respondent wrote to the appellant requesting him to resign because he had allegedly performed unsatisfactory work. The appellant, considering himself to have been wrongfully dismissed, complained to the Director General of Industrial Relations who, having unsuccessfully attempted a reconciliation, referred the dispute to the Minister who then referred it to the Industrial Court under s 20 of the Industrial Relations Act 1967 ('the Act'). G

The respondent did not challenge this reference by the Minister. But before the Industrial Court, it took a preliminary objection as to the jurisdiction of that court to hear and determine the dispute. The Industrial Court, however, overruled the objection and held that it had jurisdiction to entertain and to adjudicate upon the dispute. H

The respondent then applied to the High Court to prohibit the Industrial Court from adjudicating upon the dispute on the ground that it was not seized of jurisdiction. It was argued that the appellant, at the date of the alleged dismissal, was not only a foreigner working in Singapore but that he was also paying tax in the Republic and contributing to the Central Provident Fund of that country. In these circumstances, the Industrial Court could not adjudicate upon it because that court lacked extra- I

territorial jurisdiction. These arguments found favour with the learned judge who heard the application. He accordingly issued prohibition against the Industrial Court. Against this decision, the appellant appealed to this court.

The issues

The arguments addressed to us raised two issues. Both relate to the question of jurisdiction. The first issue is one that was canvassed at all levels in this litigation. It is whether, having regard to the facts of this case, the Industrial Court had jurisdiction to adjudicate upon the dispute referred to it by the Minister.

The second issue is closely related to the first. It was raised before the High Court. It relates to the way in which challenges are to be taken to the jurisdiction of the Industrial Court. But it is germane to the appeal, concerns judicial policy and is of general importance. We therefore think it desirable to express our views upon it. It may be conveniently put in the form of a question. Was it open to the respondent to challenge the jurisdiction of the Industrial Court without having attacked the Minister's act of referring the dispute to that court?

We will address each of these issues in turn.

The first issue: extra-territoriality

The respondent's argument in support of its case may be put in this way. The Industrial Court is a creature of statute. It therefore only has such jurisdiction as is conferred upon it, either expressly or by necessary implication, by the statute creating it, namely, the Act. The Act does not confer extra-territorial jurisdiction upon the Industrial Court. Accordingly, that court has no extra-territorial jurisdiction. The judgment of Mohd Dzaiddin J (as he then was) in *Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors* [1988] 1 MLJ 451 was cited in support of these propositions. Mr Lobo, who appeared for the appellant, did not seek to question the correctness of the decision in that case. We are unable to see how he possibly could have argued against it. We therefore accept, without hesitation, the correctness of the decision in that case and of the principle it establishes.

The respondent went on to argue that, on the facts of this case, the representations made by the appellant under s 20(1) clearly relate to matters which occurred outside the jurisdiction of the Industrial Court. We have, when setting out the fact pattern of this case, adverted to those matters relied upon by the respondent in support of the argument based on extra-territoriality. We do not propose to repeat them here.

Mr Sivabalah, who appeared for the respondent, submitted that the contract between the parties was at an end when the appellant's work permit was not renewed. He argued that a new engagement had occurred in Singapore and that the contract of employment was to be performed in that country. These are matters over which the Industrial Court had no jurisdiction. Lastly, it was submitted for the respondent that the Act was

passed for the protection of workmen — whether citizens or foreigners — working in Malaysia in the employment of Malaysian or foreign companies. The Act does not extend to workmen engaged by Malaysian companies in a foreign country to work in that country.

In support of the appeal, Mr Lobo argued that no question of an exercise of extra-territorial jurisdiction arises in this case. Here is a case where the employer is a Malaysian company. The contract of employment was entered into in Malaysia and therefore within the jurisdiction of the Industrial Court. The appellant was merely sent by his Malaysian employer to work in Singapore. There was no termination followed by a fresh engagement. There was, therefore, continuity of service in this case. It was also argued that so long as the fact pattern of a given case fell within the ambit of s 20(1) of the Act, the Industrial Court had jurisdiction to adjudicate upon the dispute.

So much for the arguments upon the first issue.

In our judgment, the facts of this case do not give rise to the exercise of any extra-territorial jurisdiction by the Industrial Court. The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concludes the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment in another company in a foreign country and was required to pay the taxes levied by that country or to make payments towards any compulsory savings scheme that was in operation in that country cannot, in our judgment, make the dispute extra-territorial in nature. Further, one should not lose sight of the fact that the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court.

It is convenient at this juncture to consider the arguments that deal with the persons to whom the Act is meant to apply.

Meaning no disrespect to counsel, we find the test suggested by Mr Lobo to be far too wide while we find that suggested by Mr Sivabalah to be far too narrow. In our judgment, it is undesirable to formulate any hard and fast rule that is meant to govern all cases that arise for decision. It depends very much on the facts of each case. But we think it safe to say this much. The fact that a workman who is engaged within Malaysia is required by his employer, who is also within the jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes.

We now turn to deal with the second issue. But before we do so, we think it is appropriate to make some observations that are, apart from being relevant to the present appeal, also of general importance.

Threshold and Anisminic jurisdiction: General

At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such

A authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed 'threshold jurisdiction' in recognition of a public decision-maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.

B The latter class concerns jurisdiction in the wider sense and is generally called '*Anisminic* jurisdiction', named after the landmark decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, a case that was to have a profound effect upon the subject of administrative law. It refers to cases where a public decision-maker, having threshold jurisdiction 'misconducts' himself in such a fashion as to exceed C his decision-making jurisdiction.

We use the expression 'misconducts' in no pejorative sense, but advisedly because the methods by which a public decision-maker may exceed jurisdiction in the wider sense are not closed. As observed by the Court of Appeal in *Sykt Kenderaan Melayu Kelantan Bhd v Transport* D *Workers' Union* [1995] 2 MLJ 317 at p 342:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations E (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

This dichotomy between jurisdiction in the narrow and wider sense was recognized, and must now be treated as settled, by the decision of this F Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 389:

> The distinction between jurisdiction at the threshold of an inquiry and the wider concept of that term is well brought out in the following passage in the speech of Lord Reid in the landmark decision of the House of Lords in G *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at p 171; [1969]1 All ER 208 at p 213; [1969] 2 WLR 168 at p 170:
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> > 'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases, the word "jurisdiction" has been used in a very wide sense, and *I have come to the conclusion that it is better not to use the term except in the narrow and* H *original sense of the tribunal being entitled to enter on the inquiry in question.* But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the I course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to

take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors, it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *R v Governor of Brixton Prison, ex p Armah* [1968] AC 192 at p 234 that if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.' (Emphasis added.)

Threshold and Anisminic jurisdiction in industrial law

The distinction between the two types of jurisdiction thus far discussed assumes great importance in the context of industrial adjudication. For there are different levels at which the machinery created by statute operates and it is important to determine the level at which the dichotomy exists.

First, there is the conciliatory level. Here, all that the Director General of Industrial Relations is concerned with is whether the parties are able to settle their differences. All that is required to activate the conciliatory jurisdiction is a complaint under s 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage.

Second, the reporting level. Once the Director General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister. If it is found that he has exceeded his powers, his action is liable to be quashed in certiorari proceedings: see *Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd* [1980] 2 MLJ 248, *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 521. Again, there is no wider jurisdiction.

Third, the referral level. When the Minister receives notification from the Director General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious. This is called the 'Hashim Yeop test': see *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 514. All that is required to call for an exercise of power by the Minister is the existence of a notification that a trade dispute — as defined by the Act, which is the sense in which that expression is employed in this judgment — cannot be settled. There is therefore no question of any wider jurisdiction existing at this stage.

But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings.

Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to. The Industrial Court is therefore empowered to take cognizance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction.

Once it is seized of the dispute in the threshold sense, the Industrial Court, unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as 'the jurisdiction to decide whether there is jurisdiction'.

We therefore take this opportunity to emphasize that, because of the different situations in which challenge to a deciding power may be taken, the term 'jurisdiction' is an expression that takes its colour from its context. Thus, when one speaks of 'the jurisdiction' of the Industrial Court, it is of the essence to determine which jurisdiction that is being spoken of. It may refer to the threshold jurisdiction conferred by the Ministerial act of referring a trade dispute; or it may equally refer to jurisdiction in the wider *Anisminic* sense. Because the grounds upon which the decision of a public decision-maker may be challenged have now been more or less settled (see *Council of Civil Service Unions & Ors v The Minister for the Civil Service* [1985] AC 374, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145), less difficulty may present itself when determining whether the Industrial Court has exceeded its jurisdiction in the wider sense. However, the same cannot be said of challenges that go to the threshold jurisdiction of the Industrial Court, particularly in the employment of the remedy of prohibition.

The question that has fallen for acute consideration in this appeal is the point at which the challenge ought to be taken. Should it be at the point at which the Minister makes the reference? Or could it be taken at the point at which the Industrial Court is seized of the dispute? It is to these matters that we now propose to address ourselves.

Point of challenge

In the normal s 20 case, the Industrial Court, after receiving the reference from the Minister, and after delivery of pleadings, goes on to decide whether there was a dismissal, and if so, whether the dismissal was for just cause or excuse. What therefore comes up for judicial review in certiorari proceedings is an award arrived at after all the merits of the case have been gone into.

But cases have arisen, as evidenced by the decisions reported in *The Malayan Law Journal*, where the employer takes a preliminary objection as to the jurisdiction of the Industrial Court to entertain the claim, for

example, on the ground that the claimant is not a workman. *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96, affirmed in [1981] 1 MLJ 115, *Inchcape Malaysia Holdings Bhd v RB Gray* [1985] 2 MLJ 297 and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 are all cases where such a preliminary challenge was taken.

In *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96, Dr Dutt made representations under s 20 of the Act, claiming that he had been dismissed without just cause or excuse. The Minister referred those representations to the Industrial Court. The reference was not challenged. Instead, the Hospital, in the proceedings before the Industrial Court, took a preliminary objection as to the jurisdiction of that court, inter alia, on the ground that Dr Dutt was not a workman. The Industrial Court ruled that he was. The Hospital then took out an application to prohibit the Industrial Court from hearing the case on its merits. Mohd Azmi J (as he then was) when dismissing the application said (at p 97):

> My first observation is that the Minister of Labour is not a party in this case; nor is there any relief sought against his decision. On the face of the notice of motion, it must, therefore, be assumed that the exercise of the Minister's power under s 20(3) in referring Dr Dutt's representation to the Industrial Court is not challenged. In the present application for prohibitory order, the question, therefore, arises whether the Industrial Court (in the instant case, the Chairman of the court) can refuse to make an award in respect of a representation referred to it by the Minister for Labour. In my judgment, there is no provision in the Industrial Relations Act where the Industrial Court can disregard a decision made by the Minister under s 20(3) of the Act. That section gives unfettered discretion to the Minister; and the exercise of that discretion has not been specifically challenged in the notice of motion. The Minister is not obliged to state the grounds on which the discretion has been exercised. It might well be that he is unable to decide whether Dr Dutt is or is not a workman under s 20(1). As stated by Suffian FJ (as he then was) in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v The Industrial Court & Ors* [1970] 1 MLJ 78 at p 81:
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> > 'Before us, the regularity of the Minister's act is not impugned and under s 114 of the Evidence Ordinance, this court may presume and does presume that the Minister's official act has been regularly performed. When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. The scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the court is at once invested with jurisdiction and is obliged to decide one way or another ... .'
>
> Similarly, in the present case, Dr Dutt being dissatisfied with his dismissal, has made representation in writing under s 20(1) of the Act. Acting under s 20(3), the Minister has referred the representation to the Industrial Court for an award. What can the Industrial Court do other than entertain the representation and decide one way or another? The only difference between *Sri Jaya*'s case and the present case is that the reference made by the Minister is not under the same section of the Act. The issue is the same, viz can the Industrial Court refuse to make a decision once a representation is referred to it by the Minister? Again, in *A-G, Malaysia v Chemical Workers'*

A *Union of Malaya & Anor* [1971] 1 MLJ 38, it was held by Abdul Aziz J that once a case is referred to it, the Industrial Court is seized with power to hear the dispute and make its award.

I am, therefore, of the view that whatever may be the rights of the parties, once the case is referred to the Industrial Court, it is fully endowed with jurisdiction.

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Once endowed with jurisdiction, it is for the Industrial Court to decide, inter alia, whether Dr Dutt is a 'workman' within the meaning of s 20(1). If he is a workman, the court must decide whether he has been dismissed without just cause or reason. If the court decides he has been dismissed without just cause or reason, the court will proceed to make an 'award', which under s 2 is not confined merely to reinstatement but is wide enough to

C cover the power to make other orders in respect of the matter referred to it.

The essence of his Lordship Mohd Azmi J's decision, which was affirmed by the Federal Court and with which we express our unqualified agreement, is that the threshold jurisdiction of the Industrial Court may be only questioned by challenging the Minister's reference. It follows that a party

D to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that court. In other words, the threshold jurisdiction of the Industrial Court cannot

E be challenged without joining the Minister and seeking relief against him.

We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of

F industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

Take this very case. The appellant's services were terminated in January 1989. The Minister made his reference on 13 September 1990. At present, some six years later, all that has been decided is that the Industrial Court was right in concluding that it had threshold jurisdiction. The

G merits of the appellant's representations are yet to be investigated into. In a war of attrition such as this, it is always the workman who suffers. The delay that would be caused by permitting such preliminary objections as was taken in this case, is in itself an excellent reason for adhering to the view expressed by Mohd Azmi J in *Assunta Hospital.*

H Mr Sivabalah has, however, asked us to exercise caution when declaring the law in this area. He says that unless the right to take preliminary objections to threshold jurisdiction before the Industrial Court is preserved, much time, energy and money may be unnecessarily thrown away. He has argued that no useful purpose would be served in having a full scale hearing before the Industrial Court only to discover at the end of it

I all that the tribunal had no jurisdiction in the first place to entertain the dispute. He has drawn our attention to two cases which, according to him, support his argument and tell against the proposition we have formulated a moment ago.

The first of these is the decision of the Federal Court in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238. It is a decision of a strong court whose judgment was delivered by Raja Azlan Shah CJ (Malaya) (as he then was), a judge of great learning. It was a case where a workman had exceeded the prescribed time limit — then fixed at one month — in making his representations. The dispute was nevertheless referred by the Minister to the Industrial Court. The employer did not challenge the reference. But it took the point of jurisdiction before the Industrial Court which ruled, quite wrongly, that it had jurisdiction to hear the case on its merits. The employer then moved for prohibition which was refused by the High Court. In allowing the appeal and directing prohibition to issue, the learned Chief Justice of Malaya said (at p 240):

> We cannot agree with the learned judge that it was for the Director General to decide whether the claim was made within the time limit, and we think he went too far when he said that there was evidence for the Director General to come to the conclusion that their claim was made within time. The determination of the issue whether the claim was made within the time limit involved mixed questions of law and fact for the industrial court, the fact being the ascertainment of the relevant conduct of the parties in pursuing their claim and the inferences proper to be drawn therefrom. Once that is ascertained, it is a question of law whether or not there was sufficient evidence that the claim was made in time. On the facts, we are of the view that the claim was presented well outside the time limit and that being so, it was for the Industrial Court to say that it was wrongly conferred with jurisdiction. In the circumstances, it is open to this court to interfere with the exercise of the Minister's discretion in referring the matter to the Industrial Court. He had certainly exercised his discretion wrongly (see *National Union of Hotel Bar and Restaurant Workers v The Minister of Labour and Manpower* [1980] 1 MLJ 189). If an error of law by the Industrial Court can be seen as a misconception of its own jurisdiction and therefore an absence of jurisdiction, this court assumes a free-wheeling power to interfere by way of prohibition whenever it appears to it that some error of law going to its jurisdiction has been made by the Industrial Court.
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> Apart from the question of jurisdiction, there remains a subsidiary matter to be decided, not the less important because it is one of a purely technical character. The respondents now say that the appellants were guilty of undue delay in applying for an order of prohibition and since the order is a matter of discretion, we should refuse it. It is said that the application should have been made sometime in July 1976, well before the Minister had referred the matter to the Industrial Court. It is not in dispute that the application was made in November 1977. But, in our view, so long as there remains something to which prohibition can apply, some act which the Industrial Court if not prohibited may do in excess of its jurisdiction, prohibition may lie: see *Estate and Trust Agencies (1927) Ltd v Singapore Investment Trust* [1937] AC 898. In such a case, delay is immaterial. We would adopt the view expressed by RS Wright J, a judge who had great familiarity with this subject in *Re London Scottish Permanent Building Society* [1893] 63 LJ (QB) 112 at p 113 that 'an application for prohibition is never too late so long as there is something left for it to operate upon'. In *R v North ex p Oakey* [1927] 1 KB 491, Scrutton LJ, after expressly approving this dictum, said (at p 503):

> 'When the sentence is unexecuted, a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced.'
>
> In the present case, we are disposed to think that the court in its discretion would order prohibition to issue against the Industrial Court prohibiting it to proceed to hear the claim under s 20(1) of the Act on the ground of lack or absence of jurisdiction.

It would take much for us to dissent from the views expressed by so learned a judge. But we find those views to be ex facie inconsistent with the proposition stated by Mohd Azmi J in *Assunta Hospital* with which we find ourselves in agreement. There are three courses open to us to resolve this conflict in the approach that is to be taken towards the threshold jurisdiction of the Industrial Court.

The first is to formally overrule *Fung Keong*. But we are not prepared to do that because of the soundness of the actual decision in that case.

The second course that is open for us is to restrict the remedy of prohibition in the context of industrial law. However, that would, as correctly pointed out by Mr Sivabalah, require us to depart from jurisprudence that has been well established for at least a century without any reasonable basis warranting such departure. We accordingly do not perceive the second course to be open to us to pursue.

Thirdly, we may, while accepting the principle established by *Assunta Hospital* and those cases it followed, recognize *Fung Keong* as establishing a very limited exception thereto only in cases where the representations under s 20(1) of the Act are in fact made beyond the time prescribed by that section. This is the course that commends itself to us. Indeed, we are of the view that the decision in *Fung Keong* may be justified upon the narrow ground that the Minister had acted in violation of the provisions of s 20(1) by referring the dispute to the Industrial Court when the representations were made to the Director General beyond the statutory time limit. In those circumstances, the Minister obviously had no power to confer threshold jurisdiction upon the Industrial Court.

It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

In our judgment, unless the Minister is separately or jointly challenged in making a reference, the High Court should be very slow to grant leave to apply for an order of prohibition against the Industrial Court whilst a reference under s 20 is pending before that tribunal. To stay such proceedings would cause undue delay and lie against the interests of industrial peace.

We now turn to the relatively easier task of dealing with the second authority relied upon by Mr Sivabalah. It is the rather controversial decision of the precursor of this court in *Inchcape*. That decision was reviewed at some length by this court in *Hoh Kiang Ngan*. No useful purpose will be served by a regurgitation of the criticism levelled against it. It is a decision that was plainly wrong, even upon its own facts. It also failed to properly appreciate the judgment of Mohd Azmi J and of the former Federal Court in *Assunta Hospital*. In our judgment, the time has come for this court to recognize that *Inchcape* was wrongly decided and is no longer good law. All that is required is to formally overrule it and that we now do.

The result

Having given this matter our most careful consideration, we were of opinion that the learned judge was wrong in holding that the Industrial Court lacked jurisdiction to hear and decide upon the dispute properly referred to it by the Minister. In the result, we allowed the appeal, set aside the learned judge's order and awarded costs to the appellant here and in the court below. The matter was remitted to the Industrial Court for hearing on the merits. The deposit paid into court was ordered to be refunded to the appellant.

Appeal allowed.

Reported by Yong Yuan Kea